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No. 88-863

In the Supreme Court of the United States

OCTOBER TERM, 1988

ESTHER FRIEDGOOD,
Petitioner,

vs.

PETERS PUBLISHING CO., a Division of
Concentric Enterprises, Inc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE DISTRICT COURT OF APPEAL OF
FLORIDA, FOURTH DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the District Court of Appeal of Florida, Fourth District, is a decision from the highest state court from which a decision could be had notwithstanding that the Supreme Court of Florida claimed to have jurisdiction to decide the case on the merits, but declined to accept jurisdiction without stating the basis for its decision?

2. Assuming that the decision of the District Court of Appeal of Florida, Fourth District, is a decision from the highest state court from which a decision could be had, does this Court lack jurisdiction to review the decision because the petition for certiorari is untimely and because the state court's decision rests on an adequate and independent state ground?

3. Assuming that this Court could assert jurisdiction, should this Court review a Florida state court decision affirming summary judgment for the defendant in a libel case on the grounds that the plaintiff (1) admitted the book review sued upon was substantially true, and (2) became a "public figure" in her role as the central witness in a murder prosecution in 1976 and failed to show that she could offer clear and convincing evidence that the defendant acted with actual malice in publishing the 1981 book review?

PARTIES TO THE PROCEEDING BELOW

The petitioner has correctly set forth a description of the parties below. The following is a list of all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of the respondent, Peters Publishing Co., as is required by Rule 28.1 of this Court:

Concentric Enterprises, Inc.
MacFadden Holdings, Inc.
MacFadden Acquisition Corp.
Lexington Investments, Inc.

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BASIS FOR JURISDICTION

The plaintiff/petitioner seeks to invoke this Court's jurisdiction to review a decision of the District Court of Appeal of Florida, Fourth District, pursuant to 28 U.S.C. §1257(3) under the time schedule as authorized in 28 U.S.C. §2101(c) and Rule 20.2, Rules of the Supreme Court of the United States (1988).

This Court lacks jurisdiction because the decision of the Fourth District is not a decision of the highest court of the state from which a decision could be had. Alternatively, if the decision of the Fourth District is a decision of the highest court, this Court lacks jurisdiction to review that decision because the petition was not filed within 90 days of rendition of the decision as required by 28 U.S.C. §2101(c), and because the decision rests on an adequate and independent state ground.

These two jurisdictional points are discussed in the first point of the argument below.

STATE CONSTITUTIONAL PROVISION AT ISSUE

Article V, section 3(b)(3), Florida Constitution (1980):

The supreme court:

* * *

May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

SUMMARY OF ARGUMENT

Point I: *Lack of Jurisdiction* Pursuant to 28 U.S.C. §1257(3), this Court may review only those decisions from the highest state court from which a decision could be had. The decision of the Fourth District is not such a decision because the Florida supreme court's decision declining to review the Fourth District's decision amounts to a decision on the merits under Florida law.

Alternatively, if the Fourth District's decision is treated as a decision of the "highest court" in Florida, the petition is untimely because it was not filed within 90 days of rendition of that decision. The plaintiff could not have had a decision from the Florida supreme court because that court did not have jurisdiction to review the Fourth District's decision. Therefore, the plaintiff's effort to obtain review from the Florida supreme court did not extend the time for seeking review in this Court.

In addition, the Fourth District's decision cites and relies on Florida common law cases establishing that libel actions may not be based on substantially true publications. The Fourth District found the book review at issue in this case substantially true and, thus, the decision rests on an independent and adequate state ground.

Point II: *Absence of Reasons for Granting the Writ.* Assuming arguendo that this Court has jurisdiction to review the decision below, it should decline to exercise it. The plaintiff's principal basis for seeking review is that the court below afforded the defendant publisher of a book review the same constitutional protection against libel actions as that afforded other journalists and historians. This was not even an arguable error

by the state court—let alone a reason that this Court should review a state court decision which does not conflict with other state or federal decisions, which does not decide any important, unsettled federal question, and which does not conflict with applicable decisions of this Court.

ARGUMENT

I.

This Court Lacks Jurisdiction to Review the Fourth District's Decision

Two jurisdictional arguments must be considered in this case. The first focuses on whether the petition for certiorari was addressed to the appropriate state court. The second, alternative argument shows that even if the petition was correctly addressed to the intermediate appellate court, it is both untimely and directed to a state court decision which rests on adequate and independent state law grounds.

A. The Fourth District Is Not the Highest Court of Florida From Which a Decision Could Have Been Had

The only state court decisions reviewable by this Court are decisions of the highest court in the state from which a decision could be had. 28 U.S.C. §1257. The Florida supreme court was the highest court from which a decision could have been had and was had in this case because its decision declining jurisdiction over the case must be read as a decision on the merits.

The petition for certiorari reflects that the Fourth District denied rehearing and rendered the decision which the plaintiff seeks to have reviewed on March 28, 1988. (Petitioner's Brief A44). The petition also reflects that the plaintiff sought review of the Fourth District's decision by the Florida supreme court (Petitioner's Brief A45), and that the Florida supreme court declined to accept jurisdiction on August 29, 1988. (Petitioner's Brief A47-48). The petition for writ of certiorari to the Fourth District was filed within 90 days of the Supreme Court of Florida's decision, but 237 days after rendition of the Fourth District's decision.

The preliminary jurisdictional issue raised by this scenario is whether the plaintiff was limited to seeking review of the Florida supreme court's decision rather than the Fourth District's decision. Analysis of this issue must begin with *American Railway Express Co. v. Levee*, 263 U.S. 19 (1923). In that case, a Louisiana court of appeal affirmed a judgment against the defendant. The defendant applied to the supreme court of the state for a writ of certiorari, but the writ was " 'refused for the reason that the judgment is correct.' " *Id.* at 20 (citation omitted in original). The defendant then sought a writ of certiorari from this Court to the Louisiana court of appeal. The plaintiff asserted that the writ of certiorari was erroneously addressed to the court of appeal rather than to the Louisiana supreme court. This Court rejected the argument, holding that the Louisiana supreme court had discretion to review the lower court's decision and that "when the jurisdiction was declined, the court of appeal was shown to be the highest court of the state in which a decision could be had." *Id.* at 20-21. This Court further held that "the limit of time

for applying to this court was from the date when the writ of certiorari was refused [by the state supreme court]." *Id.* at 21; *see also Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 (1954).

This Court also has held, however, that if the higher court's order is a decision on the merits, that order becomes the reviewable judgment. *See R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 107 S.Ct. 499, 506 (1986). Where the higher court summarily dismisses an appeal, and the dismissal could be interpreted as either a decision on the merits or a dismissal for lack of jurisdiction, this Court will consider the dismissal to be a disposition on the merits in "the absence of positive assurance to the contrary." *Id.; see also Tumey v. Ohio*, 273 U.S. 510 (1927); *Matthews v. Huwe*, 269 U.S. 262 (1925); *Hetrick v. Village of Lindsey*, 265 U.S. 384 (1924).

These cases apparently leave the rule established in *Levee* undisturbed.[1] Thus, if the petitioner has no right of review, but may only seek the higher state court's exercise of discretionary jurisdiction, then, under *Levee*, the intermediate court's decision is the only decision reviewable in this Court in the event that the higher state court declines to exercise its discretion. If, however, the petitioner seeks to invoke the *mandatory* appellate jurisdiction of the higher state court—or, in other words, makes a claim to higher appellate review as of right—and that court dismisses the case without com-

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1. *Levee* should be overruled. For purposes of this Court's jurisdiction, there is no reason to treat summary dismissals of appeals any differently from denials of discretionary review. Both decisions of the highest state appellate court afford the appellant or petitioner the same type of review.

ment on whether the decision is jurisdictional or on the merits, then the higher court's decision is the only decision which is reviewable by this Court.

In the instant case, the plaintiff sought the Florida supreme court's review of the Fourth District's decision, alleging that the Florida supreme court had jurisdiction to review the case under article V, section 3(b)(3) of the Florida Constitution. That provision states that the Florida supreme court "[m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Although this section of the Florida Constitution is permissive on its face, the Florida supreme court has interpreted the predecessors to this section—which also were worded permissively—as providing a right of review in every case where conflict jurisdiction is found to exist. For example, in *Tyus v. Apalachicola Northern Railroad Co.*, 130 So.2d 580 (Fla. 1961), the supreme court held:

> Since we have concluded that, on the face of the subject opinion of the District Court, it appears there can be no doubt about the question of direct conflict with many of our prior decisions, as well as the decision of the District Court of Appeal, Third District, . . . it becomes our duty and responsibility to consider the case on its merits and decide the points passed upon by the District Court which were raised by appropriate assignments of error as completely as though such case had come originally to this court on appeal.

Id. at 585 (footnotes omitted); *see also Adjmi v. State*, 154 So.2d 812, 817 (Fla. 1963) (holding that once the

jurisdictional issue is settled "we not only have the right but we are charged with the duty of considering this case on its merits as though it had come here originally on appeal") (footnote omitted). Thus, although the Florida supreme court refers to its jurisdiction over conflicting decisions as "discretionary," the jurisdiction is required to be exercised whenever a conflict sufficient to meet the jurisdictional hurdle has been found to exist. The court may decline to exercise jurisdiction only when it finds no such conflict.[2]

Under these circumstances, the Florida supreme court's non-explanatory decision declining to review the Fourth District decision in this case[3] is just as much a decision "on the merits" as were the summary dismissals in such cases as *R.J. Reynolds* and as have been this Court's summary dismissals. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

Because the Florida supreme court's decision was "on the merits," the decision of the Fourth District was not the decision of the highest court in Florida from which a decision could be had and therefore, in accordance with 28 U.S.C. §1257(3), the petition for a writ of certiorari to the Fourth District must be dismissed.

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2. The Florida supreme court also has "discretionary" jurisdiction, under article V, section 3(b)(5), to review decisions which address certain issues certified by the intermediate appellate courts. Studying the disposition of such certifications for a full year, a justice of the Florida supreme court observed: "In fact, all questions certified by the district courts were accepted." Overton, *A Prescription for the Appellate Caseload Explosion*, 12 Fla. St. U. L. Rev. 205, 227 (1984).

3. The Florida supreme court's decision states only that the court has "determined that it should decline to accept jurisdiction." (Petitioner's Brief A47). The court did not explain that it was doing so because it lacked jurisdiction to review the case or because it found the petition to be without merit.

B. If the Fourth District Is the "Highest Court," the Petition Was Not Timely and the Decision Is Not Reviewable

If this Court concludes that the Fourth District was the highest court in Florida from which a decision could be had, then a second jurisdictional argument must be considered. The argument advances two independent grounds for dismissal. The first is that the petition for certiorari was not timely. The second is that the Fourth District's decision rests on an adequate and independent state ground.

1. The Petition Was Not Timely

The petition for certiorari in this case was filed in this Court more than 90 days after rendition of the Fourth District's decision, but less than 90 days from the Florida supreme court's decision declining to review the decision. This creates a timeliness issue nearly identical to the issue recently raised—but not yet resolved—in *Florida Star v. B.J.F.*, No. 87-329 (U.S. filed Aug. 26, 1987), *prob. juris. noted*, 57 U.S.L.W. 3258 (U.S. Oct. 11, 1988).

The Florida supreme court is a court of limited jurisdiction. Only several narrow classes of cases may qualify for review by the Florida supreme court. Article V, section 3, Florida Constitution. All other cases are final once they have been disposed of by the district courts of appeal. *See generally* Overton, *District Courts of Appeal: Courts of Final Jurisdiction with Two New Responsibilities—An Expanded Power to Certify Questions and Authority to Sit En Banc*, 35 U. Fla. L. Rev. 80 (1983); England, Hunter & Williams, *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. Fla. L. Rev. 147

(1980). In those cases where the Florida supreme court cannot exercise jurisdiction, the district court of appeal is the highest court in the state from which a decision could be had. 28 U.S.C. §1257. Therefore, the time for seeking review of a district court of appeal decision in this Court under 28 U.S.C. §2101(c) commences on the date that the district court of appeal renders its decision. In those cases where the Florida supreme court can exercise jurisdiction, the time for seeking review in this Court commences on the date that the Florida supreme court renders its decision denying review (and hence revealing the district court as the highest court from which a decision could be had) or from its own decision on the merits. *See Levee*, 263 U.S. at 20-21 (1923).

The Florida supreme court had no jurisdiction to review the decision of the Fourth District at issue in this case. The sole basis for jurisdiction which the plaintiff alleged existed in the Florida supreme court was that the decision expressly and directly conflicts with a decision of another district court of appeal or of the Florida supreme court on the same issue of law. (Petitioner's Brief A45). As noted above, article V, section 3(b)(3) of the Florida Constitution does provide the Florida supreme court with jurisdiction to review such decisions. Yet, even a cursory review of the Fourth District decision reveals that the alleged conflict does not exist.[4]

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4. The plaintiff claimed below that the Fourth District's decision was in "direct and irreconcilable" conflict with summary judgment standards set forth in two decisions of other Florida district courts of appeal: *Axelrod v. Califano*, 357 So.2d 1048 (Fla. 1st DCA 1978), and *Nowick v. Mazda Motors of America, Inc.*, 523 So.2d 769 (Fla. 1st DCA 1988). The Fourth District in fact faithfully applied the standard as it is defined in those cases.

Whether such conflict in fact exists obviously is a question of state law which can be addressed by the Florida courts. When faced with a nearly identical question in *Florida Star* (the appeal was docketed more than 90 days from the intermediate appellate court decision sought to be reviewed, but less than 90 days from the Florida supreme court's refusal to review the decision), this Court stated:

> Because this appeal involves a question of law of the State of Florida which is determinative of this cause and for which there is no controlling precedent of the Supreme Court of Florida, this Court, pursuant to Article V, Section 3(b)(6) of the Florida Constitution, certifies to the Supreme Court of Florida and respectfully requests that Court to answer, the following question: Whether the Florida Supreme Court had jurisdiction, pursuant to Article V, Section 3(b)(3) of the Florida Constitution or otherwise, to hear Appellant's appeal in this cause from the Florida First District Court of Appeal?

Florida Star v. B.J.F., 108 S.Ct. 499, 499 (1987) (order certifying question to Florida supreme court).

In response, the Florida supreme court rendered *Florida Star v. B.J.F.*, 530 So.2d 286 (Fla. 1988), which answers the question not only for the case before it, but for all cases which may subsequently arise, including the instant case. The decision purports to bisect the text of article V, section 3(b)(3) of the Florida Constitution into both a "general grant of discretionary subject-matter jurisdiction" and "a constitutional command as to how the discretion itself may be exercised." 530 So.2d at 288. Having accomplished this metaphysical division of section

3(b)(3), the court then concluded that "it is not necessary that conflict actually exist for this Court to possess subject-matter jurisdiction, only that there be some statement or citation in the opinion that hypothetically could create conflict if there were another opinion reaching a contrary result." 530 So.2d at 288. The decision is surprising because it appears to be inconsistent with the language of the constitution itself—as well as numerous previous decisions of the Florida supreme court which are neither cited in this decision nor overruled—which requires an actual, expressed conflict of opinions, rather than a hypothetical possibility of conflict. *See* Fla. Const. art. V, §3(b)(3); *see also Reaves v. State*, 485 So.2d 829, 830 (Fla. 1986); *Davis v. Mandau*, 410 So.2d 915 (Fla. 1981). Until the *Florida Star* decision, it was well-settled that the conflict "must be found within the confines of the majority opinion" in order for jurisdiction to exist. A. England & T. Simon, 1 *Florida Appellate Practice Manual* §2.22(a) (rev. 1988).

The decision's radical departure from the text of the Florida Constitution and precedent is candidly explained by the Florida supreme court as necessitated by its concern regarding the impact which its decision might have on litigants seeking review in the United States Supreme Court. The court wrote:

> We confess that we are much influenced in this holding by the procedural quagmire that would result from a negative answer [to the jurisdictional question]. . . . If, after the fact we held in a case such as this that there was no jurisdiction, litigants would be placed in a needlessly burdensome position. A party would have to try to predict which court ultimately would recognize jurisdiction in the case and file a

> petition for review accordingly. A party who files only in the United States Supreme Court, however, would risk the objection that he or she has not exhausted state court remedies. On the other hand, a party who files only in the Florida Supreme Court and is denied review, would risk the objection made by B.J.F. here that the later appeal to the United States Supreme Court is untimely.

530 So.2d at 289.

In assisting litigants, however, the Florida supreme court did not wish to go so far as to actually expand the category of cases which would be reviewable by it. It wanted to ensure that its broad interpretation of its "jurisdiction" would not result in a flood of new petitions for review. To accomplish this feat, the court returned to the "constitutional command" in article V, section 3(b)(3)—parsed earlier from jurisdictional considerations—which governs how its discretion may be exercised. According to the court, it has adhered to this part of article V, section 3(b)(3), "in refusing to exercise [its] discretion where the opinion below establishes no point of law contrary to a decision of this Court or another district court." 530 So.2d at 289.

Thus, the court came to the absurd conclusion that although it has discretionary jurisdiction to review any case containing a hypothetical conflict, it is constitutionally forbidden from exercising that discretion.

The Florida supreme court's decision is a transparent attempt to manipulate this Court's jurisdiction by creating a farcical procedure in the Florida courts. A party must now seek review of a Florida district court of appeal decision in the Florida supreme court whenever such a de-

cision consists of an opinion which "hypothetically could create conflict," *id.* at 288, yet, there is no possibility that the Florida supreme court will review the decision because such exercise of its discretionary jurisdiction is proscribed by the constitution.

The reality which continues to exist in the Florida courts after *Florida Star* is that, where the decision contains no actual, express and direct conflict with a decision from another district court of appeal or from the Florida supreme court, the highest court from which a decision can be had is the district court of appeal.

The reality in this case is that the Fourth District was the highest court in Florida from which the plaintiff could have obtained a decision and therefore, the time for seeking review in this Court commenced from the date on which the Fourth District rendered its decision, rather than the date on which the Florida supreme court declined to review the case. Significantly, the plaintiff in this case has not been prejudiced by any confusion which the Florida supreme court's *Florida Star* decision may have engendered. As noted, the Fourth District rendered its decision on March 28, 1988. The Florida supreme court did not render the *Florida Star* decision until September 1, 1988—long after the time for seeking review by this Court of the Fourth District's decision in this case had expired. It should have been apparent to the plaintiff that the Florida supreme court would have had no jurisdiction to review the Fourth District's decision and she should have filed her petition for certiorari within 90 days of the date the Fourth District rendered its decision.

The one remaining point is how this Court can assure itself that the Florida supreme court did not in fact

have jurisdiction to review the Fourth District's decision. As noted, this is a matter of state law. But also as noted above, the Florida supreme court has held that it not only has the right, but the duty to review every decision which it finds to be within its discretionary jurisdiction. It is appropriate therefore for this Court to assume that whenever the Florida supreme court declines to accept jurisdiction, it is doing so because it is without jurisdiction to review the case. *See Norfolk & Suburban Turnpike Co. v. Virginia*, 225 U.S. 264, 269 (1912).

2. The Fourth District's Decision Rests on an Adequate and Independent State Ground

When a state court decision rests on an adequate and independent state ground, the Supreme Court is without jurisdiction to review the case. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1037 (1983); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945); *see also* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 501 (1977) (noting that such judgments "not only cannot be overturned by, they indeed are not even reviewable by, the Supreme Court of the United States. [The Court is] utterly without jurisdiction to review such state decisions"). The rationale for this limitation "is found in the partitioning of power between the state and Federal judicial systems and in the limitations of [the Court's] own jurisdiction." *Pitcairn*, 324 U.S. at 125. As this Court has explained:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge

> federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion.

Id. at 125-26. "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of th[e] Court's refusal to decide cases where there is an adequate and independent state ground." *Long*, 463 U.S. at 1040.

In the instant case, the Fourth District Court of Appeal set out in a "plain statement,"[5] the adequate and independent state ground on which its decision rested. Setting forth the well-established principle of Florida common law that a plaintiff can recover in a libel action only if he can prove that the statements complained of are false—and citing three of the leading cases supporting that proposition—the court found that "the alleged defamatory material is a characterization of conduct substantially admitted by the plaintiff to have occurred." *Friedgood v. Peters Publishing Co.*, 521 So.2d 236, 242 (Fla. 4th DCA), *pet. for rev. denied*, 531 So.2d 1353 (Fla. 1988). The court thus concluded that, as the defendant had argued,[6] the statements complained of were

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5. *Long*, 463 U.S. at 1040-44. In *Long*, the Court articulated the requirement of a "plain statement that the decision below rested on an adequate and independent state ground." *Id.* at 1044.

6. It is significant to note that, throughout the proceedings in this case, the defendant has argued that the Florida common law precludes the maintenance of this libel action because the undisputed material facts establish that the publication is not substantially false.

not substantially false and that therefore, as a matter of Florida common law, an action for libel could not be maintained by the plaintiff.

Because the Fourth District rested its decision on a state ground that is adequate to support the judgment and that is independent of any federal grounds for decision, this Court must decline to exercise its jurisdiction to review the state court's decision. Review would result only in the rendering of an advisory opinion and would intrude on the independent operation of the state courts.

a. Substantial Truth Is an Independent State Ground for the State Court's Decision

The Fourth District's express conclusion that the allegedly defamatory statements were substantially true, although reached in the context of analyzing the federal actual malice issue, provides a plain Florida common law ground for the decision. The conclusion was not compelled by any federal law or interpretations thereof. Rather, the Fourth District rested its conclusion solely on Florida common law cases that themselves had relied on the well-established principle of the state's common law that libel actions may not be grounded on substantially truthful publications.[7]

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7. The initial inquiry in a Florida libel case has always been to determine whether the statements at issue are substantially false. *See* discussion *infra* at section I.B.2.b. Until recently, there has been considerable doubt regarding whether any similar requirement is imposed by the first amendment. In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558 (1986), the Supreme Court eliminated that doubt, holding that "a public-figure plaintiff must show the falsity of the statements at issue in order to prevail on a suit for def-

(Continued on following page)

For example, the Fourth District expressly relied on its prior decision in *Byrd v. Hustler Magazine, Inc.*, 433 So.2d 593 (Fla. 4th DCA 1983), *pet. for rev. denied*, 443 So.2d 979 (Fla. 1984), wherein the court had determined that, as a matter of Florida common law, "[a] false statement of fact is the *sine qua non* for recovery in a defamation action." *Id.* at 595 (emphasis in original). Indeed, in drawing that conclusion, the court in *Byrd* relied exclusively on Florida common law, citing no federal constitutional case law for support. In addition to *Byrd*, the Fourth District in the instant case cited its decision in *Wolfson v. Kirk*, 273 So.2d 774 (Fla. 4th DCA), *pet. for rev. denied*, 279 So.2d 32 (Fla. 1973), a decision that, like *Byrd*, relied solely on Florida common law. Finally, the Fourth District relied on *McCormick v. Miami Herald Publishing Co.*, 139 So.2d 197 (Fla. 2d DCA 1962), a case decided before the United States Supreme Court had held that constitutional considerations apply in libel cases.[8]

That substantial truth is an independent state ground for the Fourth District's decision is clear because the court, after finishing its analysis of the substantial truth doctrine, went on to hold separately that "[i]*n any case*,

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Footnote continued—

amation." 106 S.Ct. at 1563. The Fourth District did not, however, cite or rely on the *Hepps* decision. Thus, the recent, additional "constitutionalization" of libel law by *Hepps*, long after the Florida "substantial truth" doctrine was well-established as a matter of state common law, does not provide a jurisdictional basis for this Court to review the state court decision. This is not a decision such as *Michigan v. Long*, 463 U.S. 1032, where the state court decision merely cited to a state constitutional provision and then "relied *exclusively* on its understanding of . . . federal cases" to interpret that state law. *Id.* at 1043 (emphasis in original).

8. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding, for the first time, that constitutional considerations apply in libel actions).

the . . . evidence of actual malice fall[s] well short of the clear and convincing standard mandated by the U.S. Supreme Court." *Friedgood,* 521 So.2d at 242 (emphasis added). Thus, the federal ground appears as an independent ground for affirmance of the summary judgment.

b. Substantial Truth Is an Adequate State Ground for the State Court's Decision

The state law ground articulated by the Fourth District is adequate to support the judgment without consideration of any federal question. *See generally Fox Film Corp. v. Muller,* 296 U.S. 207, 210-11 (1935); *Enterprise Irrigation District v. Farmers Mutual Canal Co.,* 243 U.S. 157, 164-65 (1917). A state law ground is not regarded as inadequate unless it "is so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the Federal question." *Enterprise Irrigation,* 243 U.S. at 164. Where the state ground has any "fair support," this Court is "not at liberty to inquire whether it is right or wrong, but must accept it." *Id.*

The state ground upon which the decision below rests has far more than "fair support." The substantial truth doctrine is firmly rooted in the Florida common law. *See, e.g., Byrd,* 433 So.2d at 595; *Delacruz v. Peninsula State Bank,* 221 So.2d 772, 775 (Fla. 2d DCA 1969) (plaintiff required to prove falsity); *Hawke v. Broward National Bank,* 220 So.2d 678, 679-80 (Fla. 4th DCA 1969) (plaintiff required to plead falsity). Florida's Second District Court of Appeal observed in *McCormick v. Miami Herald Publishing Co.*:

> "It has been held that newspapers are not to be held to the exact facts or to the most minute details of

> the transactions they publish, that what the law requires is that the publication shall be substantially true, and that mere inaccuracies, not affecting materially the purport of the article, are immaterial."

139 So.2d at 200 (citation omitted).

The contemporary, common law framework for determining whether an allegedly defamatory statement would be treated as "substantially true" under Florida law was established by the facts of *McCormick*. The plaintiff in that case sued a newspaper because it had published an article about his evasion of taxes. The article gave factual descriptions of tax liens on the plaintiff's property and said that federal agents had collected his salary. The plaintiff claimed that some of the facts were in error and that the article accused him of committing a crime. The court rejected the contention that a few factual errors tainted the entire article so as to make it actionable, finding that: "A workable test is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Id.* (citation omitted).

Since the decision in *McCormick*, many Florida courts have accepted and applied the rationale from that case. *E.g., Byrd,* 433 So.2d at 595; *Hill v. Lakeland Ledger Publishing Corp.*, 231 So.2d 254, 256 (Fla. 2d DCA 1970); *Bair v. Palm Beach Newspapers, Inc.*, 2 Fla. Supp.2d 137, 138-39 (15th Cir. 1982), *aff'd*, 444 So.2d 1131 (Fla. 4th DCA 1984); *see also Hallmark Builders, Inc. v. Gaylord Broadcasting Co.*, 733 F.2d 1461, 1463-64 (11th Cir. 1984) (applying Florida law); *Valentine v. CBS Inc.*, 698 F.2d 430, 432 (11th Cir. 1983) (applying Florida law).

In the instant case, the Fourth District's decision faithfully adhered to the substantial truth doctrine, comparing the gist or sting of the statements published to the truth admitted by the plaintiff. *Friedgood*, 521 So.2d at 242. However the words of the book review are construed, the gist of the meaning conveyed is that the plaintiff concealed evidence of her mother's murder at her father's direction. This is in fact admitted by the plaintiff. *Id.* at 242-43. Therefore, the same judgment would be rendered by the state court even after a correction by this Court of any error in the Fourth District's statement or application of the federal law. Thus, a decision by this Court "could amount to nothing more than an advisory opinion." *Pitcairn*, 324 U.S. at 126.

Because it is "clear from the opinion itself that the state court relied upon an adequate and independent state ground," *see Long*, 463 U.S. at 1042, this Court must decline to exercise its jurisdiction over this case.

II.

No Reasons Exist for Granting the Writ

Even if this Court has jurisdiction to review the Fourth District's decision, a writ of certiorari should not be granted in this case. Nowhere in the petition for writ of certiorari does the plaintiff make a serious attempt to show that the reasons justifying review by this Court, as set forth in Rule 17.1 of this Court, exist in this case.

Rather, the plaintiff argues principally that this Court should review the decision below because the Florida court afforded the publisher of a book review the same constitutional protection from a libel suit as that which traditionally has been afforded to other journalists and

historians. This simply is not a reason for granting review, nor is it even a basis to question the decision below.

A. The State Court Did Not Decide a Federal Question in a Way in Conflict With Another State Court of Last Resort or a Federal Court of Appeals

The plaintiff fails to cite a single decision of a federal court of appeals or of another state court of last resort which conflicts with the decision below. In fact, the plaintiff emphasizes that such federal courts of appeals decisions as *Contemporary Mission, Inc. v. New York Times Co.*, 842 F.2d 612 (2d Cir.), *cert. denied*, 109 S.Ct. 145 (1988); *Street v. National Broadcasting Co.*, 645 F.2d 1227 (6th Cir.), *cert. granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981); *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981); and *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978), were factually dissimilar from the instant case. (Petitioner's Brief at 17).

B. The State Court Did Not Decide an Important Federal Question Which Has Not Been, But Should Be, Settled by This Court

The plaintiff observes that this Court expressly reserved for another day in *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979), this question: "[W]hether or when an individual who was once a public figure may lose that status by the passage of time." *Id.* at 165 n.7 (quoted in Petitioner's Brief at 16). But that question also was left unresolved by the Florida court below. The Fourth District found no need to address the issue be-

cause the public controversy which initially gave rise to the plaintiff's public figure status in 1976 still existed at the time the book review at issue was published. The court noted: "Esther's father remains incarcerated and, the record reflects, still professes his innocence. It would seem reasonable under these circumstances to conclude that public discussion about the case may continue." *Friedgood,* 521 So.2d at 242.

Furthermore, close comparison of the facts of *Wolston* and other cases which have raised the "passage of time" issue such as *Street,* 645 F.2d 1227, confirm that the "passage of time" issue is not properly raised in the instant case.

In *Wolston,* the defense argued that the plaintiff became a public figure by choosing not to appear before a controversial grand jury investigating Soviet espionage during 1957 and 1958. The plaintiff insisted initially that, even if this were true, he had not remained a public figure for purposes of a libel action based on a book published 16 years later in 1974, long after the controversy regarding the grand jury investigation had been extinguished and long after the plaintiff had been the subject of any public discussion. *See* 443 U.S. at 165 n.7.

In *Street,* the plaintiff became a public figure by virtue of her involvement in a widely reported rape trial in 1933. Immediately after the trial, the plaintiff disappeared from public view. *See* 645 F.2d at 1230. More than 40 years later, NBC broadcast a historical drama regarding the rape trial and the plaintiff sued for libel, claiming that even if she had obtained public figure status during the 1933 trial, the elapse of 40 years during which she was not in the public view required that her status be changed to that of a private figure. *Id.* at 1235.

In the instant case, by contrast, the time that elapsed between the plaintiff's initial involvement in the controversy at issue and the time of publication was minimal[9] and, perhaps more importantly, the plaintiff never truly left the public eye. The plaintiff first injected herself into the controversy surrounding her father's murder prosecution in 1976. It is not disputed in this record that the prosecution was the subject of detailed and widespread press coverage from 1976 through 1979.[10] In late 1980, Leonard Levitt published a book concerning the Friedgood family and the murder, while the appeal of the murder conviction itself and related litigation continued to spawn controversy and public debate.[11]

Just several months after publication of Levitt's book, the respondent published the book review at issue. There is no evidence—upon which the Court might construct a "passage of time" rule—that this plaintiff ever withdrew into a private existence. The issue cannot be meaning-

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9. The Fourth District found this point of distinction critical, observing: "Unlike *Street*, we do not have a 40-year interval but rather one of a few years." *Friedgood*, 521 So.2d at 242.

10. The plaintiff moved to Florida during this time, but remained in public view, working first as a judicial clerk for the District Court of Appeal of Florida, Fourth District, running for the post of city commissioner of West Palm Beach in 1978, becoming editor of the *Palm Beach County Bar Bulletin*, giving radio interviews on various legal issues, and lobbying the Florida legislature for a planned parenthood organization.

11. *See Midland Ins. Co. v. Friedgood*, 577 F. Supp. 1407, 1409 & n.2 (S.D.N.Y. 1984) (reporting on the activities of the "Committee to Free Dr. Charles Friedgood" which purportedly raised as much as $145,000 "from assorted acquaintances, patients and others believing in Dr. Friedgood's innocence"); *People v. Friedgood*, 58 N.Y.2d 467, 462 N.Y.S.2d 406 (1983) (describing the 11-week jury trial and the claims of prosecutorial misconduct, juror misconduct and perjury in Dr. Friedgood's collateral attack on the verdict).

fully addressed in this case and accordingly, must be left for still another day.

Of course, the plaintiff has not plainly stated that she even contests the essential holding of such cases as *Street* that the passage of time does not erode an individual's public figure status. Rather, plaintiff apparently has accepted that the passage of time will not destroy such status for purposes of journalistic and historical writings and appears to assert only that public figure status should not continue to be ascribed to the plaintiff when the defendant is a book reviewer. This argument is not rooted in any analysis of this Court's decisions[12] or the decisions of any other court. In fact, the argument invites the Court to distinguish between different types of media and different forms of expression in a fashion which is impermissible under the first amendment itself. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (holding discrimination between types of media violates the first admendment in the absence of compelling, narrowly tailored reasons); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (same).

C. The State Court Did Not Decide a Federal Question in a Way in Conflict With Applicable Decisions of This Court

In an apparent attempt to make some showing that there is a basis for seeking review, plaintiff argues near the conclusion of her brief that if this Court is to be true

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12. This Court at least implicitly has rejected such an argument in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (holding that constitutional protections against libel actions apply to all speech about matters of public concern).

to *New York Times*, 376 U.S. 254, and to *Wolston*, 443 U.S. 157, this Court should exercise its jurisdiction because "there is not the slightest suggestion that history was being chronicled, reported, or digested." (Petitioner's Brief at 21). The argument is a *non sequitur*. Neither *New York Times* nor *Wolston* confines the constitutional protections of the press to chronicles, reports or digests of history. Moreover, even if such a restriction could be gleaned from those cases, the article at issue would qualify for the available protection. The book review appeared in a national magazine of general circulation. It chronicles not only the history of Dr. Friedgood, the Friedgood family, the Friedgood murder trial, and the changes in New York law which were prompted by the *Friedgood* case, but it also reports on the significant literary fact that a book regarding this subject has been published. Such a publication is both a journalistic and historical writing entitled to the full protection of the first amendment.

CONCLUSION

The petition for writ of certiorari to the District Court of Appeal of Florida, Fourth District, should be denied.

Respectfully submitted,

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